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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 129.

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF LOUISE P. V. WHITCOMB, *Petitioner,*

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

In this brief we undertake merely to discuss certain contentions of the Commissioner which are not alluded to in our main brief. We do not here undertake to answer those contentions of the Commissioner as to law or facts which are adequately covered in our main brief.

I.

THE CONSTRUCTION OF SECTION 219 CONTENDED FOR IN OUR MAIN BRIEF IS CORRECT.

Nothing in the Government's brief, we submit, answers the argument on this point in our main brief (pp. 14-27).

The Commissioner has from time to time taken several different positions as to the construction of the applicable provisions of section 219.

As we pointed out in our original brief (pp. 18-21) the regulations promulgated under the Revenue Acts of 1918 and 1921 (as well as those promulgated under later Acts) indicate that the Treasury Department construed the Act as we contend it should be construed, *i. e.*, as requiring the beneficiary of a trust to include in his return of income from the trust only such of that income as was properly paid to him. The Government does not contend that the applicable regulations have ever been in any way modified.

Moreover, for years in the cases which arose under this section the Commissioner assumed that it was essential to show that the beneficiary was properly entitled to income paid to him in order to tax it to him. In a number of these cases which are cited on p. 14 of the Commissioner's brief, beneficiaries of trusts contended that they were not taxable on all income from trusts properly received by them but only on their share of the statutory net income received by the trust after taking all deductions allowable in computing net income of individuals. The Commissioner, however, successfully contended that such beneficiaries were taxable on all income which had been properly paid (or even if it not paid, all which was payable) to them by the trustee, even if the total income thus taxed was in excess of the statutory net income. But in none of these cases, so far as we can ascertain, did the Commissioner take the position that the mere receipt of income by the beneficiary was conclusive (see p. 21 of our original brief, and particularly footnote 6 on pp. 21-22).

In the hearing of the instant case in the Circuit Court of Appeals the Commissioner, apparently for the first time, made the contention that the mere receipt of income by a beneficiary was sufficient to make it taxable to him, and that Court said (R. 158-159):

> It is clear that Congress when enacting the sections referred to intended to tax each year to the beneficiary of any trust the share of the trust income which was distributed to him in that year, and to tax to the trustee in his fiduciary capacity, any income which was not to be distributed. * * *
>
> * * * the principle then applicable is that where the beneficiaries receive the income, or in case they do not, the trust estate, is taxable upon the full amount of the income actually received during the year without deduction for depreciation sustained by the corpus of the trust.

But this statement of the court apparently is not satisfactory to the Commissioner. For he now argues (pp. 24-25 of his brief):

> We submit that income distributable within the meaning of Section 219 is income which was reasonably regarded by the parties as distributable at the time it was distributed.

And he now apparently disclaims any intention to argue that all "items distributed are taxable" (Footnote 8, page 25 of his brief).

A sufficient answer to this newest contention as to the construction of the statute is that it is supported neither by the language of the statute nor by the practice under it. Thus in *Hubbell v. Burnet,* 46 F. (2d) 446 (C. C. A. 8th), certiorari denied 283 U. S. 840, the Commissioner successfully asserted a deficiency against a beneficiary of a trust on the ground that he was entitled to larger payments from the trustee than he had actually received or ever claimed. In that case the Commissioner did not argue that the test was whether the parties (*i. e.,* the trustees and the

beneficiaries) reasonably regarded the amount in question as distributable: he boldly asserted that regardless of what the trustee and the beneficiaries had done, if the beneficiary was entitled to it, it was taxable to him. There is nothing in the report indicating that the Commissioner, the Board or the Court made any inquiry as to what was "reasonably regarded by the parties as distributable". The fact that one of the three judges of the Circuit Court of Appeals dissented on the question of the construction of the will would seem to indicate that the construction of the will which had been adopted by the trustee was not unreasonable, even though it turned out to be contrary to the views of two out of three of the judges of the Circuit Court of Appeals.[1]

The Commissioner relies upon the *North American Consolidated v. Burnet*, 286 U. S. 417, and various cases in the lower federal courts, holding that under sections 213 and 233 of the Act of 1921, and similar provisions, amounts received "under a claim of right"[2] may be taxable as income within the meaning of those sections in the year in which

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[1] An important decision illustrating this principle is that embodied in the letter from the Acting Commissioner to the Corporation Trust Company, dated March 24, 1917 (Corporation Trust Company 1918 Service, pp. 366-367, 1919 Service, pp. 141-142). There had been a devise in trust, the decedent dying in September, 1913. Until 1916, however, distribution was impracticable. At that time the shares of the net income during the earlier years 1913, 1914 and 1915 were ascertained. The fiduciaries were then directed to make fiduciary returns in 1916 for the earlier years, reciting the interests of the beneficiaries. The beneficiaries were directed to make amended returns for the earlier years where their income was such as to require returns. The fact that actually a large amount of income was distributed in 1916 did not justify the imposition of a higher tax in that year upon all of that income. The income was allocated to the years in which it was *distributable*, rather than the one year in which it was *distributed*.

See also *McClung v. Commissioner*, 13 B. T. A. 335; *Appeal of Estate of Tyler*, 9 B. T. A. 255; and *Heywood v. Commissioner*, 11 B. T. A. 29.

[2] The argument that the beneficiary in the instant case received the amounts in question "under a claim of right" is somewhat strained. It must be obvious that this beneficiary, who was a widow, merely took what the trustee paid her; and there is nothing in the record which indicates that at the time of the receipt of this money she made any claim whatever as to what she was entitled to or that the matter which was later decided against her was then in any way brought to her attention. The situation is different from that in which a business man or a corporation has taken affirmative steps to collect the amount in question.

they are received, even though the right to these amounts is at the time disputed and even if it is ultimately determined that the taxpayer was not entitled to these amounts. We may concede that these decisions go so far as to hold that amounts received even wrongfully may constitute income in the year in which they are received, but none of these cases arose under section 219 and none of them throws any light upon the meaning of that section.

Under section 219, everything which is income must be returned either by the trustee or by the beneficiary and consequently nothing which is income escapes. But under section 219 the *beneficiary* of a trust is not required to return everything received by him as income of the trust but merely "that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not".

The Commissioner (Res. Br. 38-39) also argues that the words "order governing the distribution" in Section 219, cannot have reference to such an order as that of the probate court here involved. First, he contends that the order referred to in the statute cannot refer to an order entered after distribution is made. This contention is answered on pages 33-34 of our main brief.

Secondly, the Commissioner argues (Res. Br. 39-40) that the phrase "order governing the distribution" applies only to income collected by a guardian for an infant.

We submit that there is nothing in the language of the 1921 Act or any later Act supporting this contention. This is a strained construction, and it is not suggested by the Regulations which the Department issued construing this section. (See Article 345 of Regulations 62, p. 49 of appendix to our main brief.)

Subdivision (4) of subsection (a) does not use the word "order." The only reason why subdivision (4) of subsec-

tion (a) groups the two kinds of income which it does is that the legal title to the income mentioned in subdivisions (1), (2) and (3) in each case remains in the fiduciary until the end of the taxable year, whereas the legal title of the income treated in subdivision (4) does not remain in the trustee. Under subdivision (4), as soon as the *distributable* income becomes distributable, whether by virtue of a trust instrument or a court order, it is regarded for income tax purposes as passing to the beneficiary. Since a guardian is a mere curator and at no time has legal title, *all* of the income received by a guardian vests immediately in the ward. For these reasons, subsection (d) provides that the two classes of income mentioned in subdivision (4) of subsection (a) are not taxable to the fiduciary, but to the beneficiary. Subsection (b) makes provision for returns accordingly. There is nothing in any of this which requires that the word "order," as used in these later subsections, or in any other portion of the act, be restricted to orders directed to guardians.

In Section 219 of the 1924 and the 1926 Acts, the clause "pursuant to the instrument or order governing the distribution" does not occur in connection with the word "distributable". The omission of this clause is, however, without significance, as Congress did not intend to change the meaning of these provisions (See Senate Report No. 398, 68 Cong. 1st Sess., p. 25; House Report No. 179, 68 Cong. 1st Sess., p. 21). The 1924 and 1926 Acts do not, as the Commissioner's brief suggests (pp. 39-40), contain any reference to "court *orders*" or indicate that what is taxable to guardians or their wards is dependent upon what is distributed according to the directions of the court. All income collected by a guardian "which is to be held or distributed as the court may direct", regardless of how much of it is held and how much of it is distributed, is taxable to the ward. (See Sec. 219 (b) (2) printed in the Appendix, p. 46, of our main brief; Regulations 65, Art. 342 (2); Regulations 69, Art. 342 (2).)

The Commissioner now suggests, rather faintly, (Res. Br. pp. 40-43) that the beneficiary may be entitled to a deduction in the year of repayment of the sums improperly paid to him, but the only section of the statute which he suggests gives any such right is that allowing deduction for "losses sustained during the taxable year * * * if incurred in any transaction entered into for profit, although not connected with the trade or business." It seems obvious that the beneficiary's passive receipt of a payment from the trustee cannot be regarded as a "transaction entered into for profit", and the Government cites no case involving any such facts.

The outstanding significant matter in this connection is that in the only case in which this point was raised, the Commissioner argued and the Board of Tax Appeals held that no such deduction could be made. *Pyle v. Commissioner,* 16 B. T. A. 218.

II.

OUR CONTENTION AS TO THE EFFECT OF THE ORDER OF THE STATE COURT IS CORRECT.

Most of the argument in the Commissioner's brief to the contrary is, we submit, answered in our main brief, pp. 27-34.

None of the Supreme Court cases which the Commissioner cites deals with the taxability of property, the rights to which have been settled by state courts of appropriate jurisdiction. Although ordinarily in a new controversy the federal courts may decline to follow state decisions, this, we submit, cannot be so where the question is merely what property rights the taxpayer has and the rights of the taxpayer have actually been settled by a state court of competent jurisdiction. The federal courts cannot change that decision or in any way enlarge the taxpayer's rights, and if they assume to hold, contrary to the decision which settled his rights, that he had other or greater rights, the effect of the decision of the federal courts is merely to im-

pose a tax on something to which as a matter of fact and of law the taxpayer was not entitled and to which he can never become entitled. If our construction of the tax act is correct, Congress did not intend to permit any such anomalous situation to exist.

Let us suppose that the probate court had held that the taxpayer was entitled to the amount in question. Could the taxpayer then contend, in a tax suit, that the decision of the probate court was incorrect and that the federal court should pass on the question of his rights and disregard the decision of the state court? The Commissioner, to be consistent, must admit that every beneficiary of a trust has this right. Such a procedure would open the federal courts in tax cases to all kinds of controversies which they were never intended to decide.

We submit that a reading of the cases cited in the briefs will disclose no case in this Court and only a few cases in the lower federal courts which support the view of the Commissioner. Those few cases are, we submit, wrong, and contrary to the well reasoned cases cited in our main brief (pp. 29-34).

One argument in the Commissioner's brief under this point may deserve attention inasmuch as it is not alluded to in our main brief. That is that the decree of the state court is not entitled to the effect ordinarily accorded to the judgments of state courts, because, as the Commissioner asserts, "it was nothing more than a friendly settlement without any real contest and did not represent a considered adjudication of the questions involved."

In the first place, we submit that the argument, even if based on facts properly proved by evidence or found by the Board, would be unsound. The decree is either valid or it is invalid. The Commissioner's brief expressly explains that he does not contend that the order "was invalid or improper." (Footnote 12, p. 34.) In his briefs in the courts

below, the Commissioner expressly admitted: "We do not charge collusion." At no time has the Commissioner contended that the state court did not have jurisdiction of the account of the trustee and the right to the income of the beneficiary here involved. There is no evidence to support such a contention, and the Board expressly found that the court "has jurisdiction over the trust until its termination for the settlement of accounts and for other purposes" and that "all of the parties interested in said trust estate * * * were notified of the filing of said account of said trustee, and of said objections, and were represented by counsel at the hearing thereon." (R. 38-39.) Therefore the decree was valid.

We need not consider the effect of a consent decree, for there is no finding or no evidence that this was a consent decree. (See the decree, R. 140-144.) The fact is, as is reasonably apparent from the record, that the decision was not agreed to by the parties, but was made by the court itself after consideration of the various contentions of the parties in interest. The fact that subsequent to the decision, there was agreement as to the *form* of certain parts of the decree, is, of course, entirely immaterial. The court did hear and decide the issues—it disallowed certain objections to the account and sustained others. (R. 143-144.)

If the Commissioner had wished to raise the point which he now suggests, he should have taken certain steps which he did not take; and we submit that, even if his contentions are material, there is no sufficient basis of fact in the record to support them. He raised no such issue by his answer before the Board (R. 29-31). He obtained no finding from the Board to the effect that the decision of the state court was not, as it purports to be, its considered judgment. He introduced no evidence before the Board tending to support such a finding. In his petition for review by the Circuit Court of Appeals for the Ninth Circuit and in his petition for review by the Court of Appeals for the District of Columbia he alleged that the state court "found" that the trustee's distribution was improper, and he did not

suggest that this was not the considered judgment of the state court (R. 57-58 and R. 5-6 in No. 146). Neither of the reviewing courts has found that it was not the considered judgment of the state court. In this situation we submit that he cannot now ask this Court to scrutinize the evidence and draw inferences from it in order to reach a conclusion of fact which has not been found.

If, however, this Court does care to scrutinize the situation, the following matters should be considered: The Superior Court did not allow the objections of the remaindermen in their entirety. One of them, relating to another matter, was disallowed (R. 60). This would indicate that the proceedings were not cut and dried, but that the Court exercised its own judgment. The fact (stressed by the Commissioner's brief) that the hearing was held and the decrees entered soon after the petition for allowance of the accounts was filed, is without significance. It is, of course, not unusual, in matters of this kind, for a trustee and his counsel to notify the beneficiaries informally of what is going to be done, and to postpone the filing of the petition until after discussion of all phases of the matter with them and their counsel and until after the time for a hearing, etc., has been fixed. Whether the proceeding was "friendly" or not must be unimportant. Obviously it is immaterial whether the issue aroused personal hostility between the parties or whether they and their counsel submitted the matter to the Court in an expeditious and amicable way.

It seems to us absurd to believe that the life tenants would voluntarily have given up what they lost by the decrees merely in the hope of obtaining the slight reduction in the federal taxes which is involved. They were ordered to pay back over $250,000 for the years involved in the pending cases, and the tax liability in controversy is only a very small fraction of this amount. Moreover, they were ordered to pay back over $300,000 for previous years, and the trustee was instructed to reserve reasonable amounts for depreciation annually in the future until the

termination of the trust. On May 28, 1928, several months before the hearing in the Superior Court, the Revenue Act of 1928 had been approved. Section 23 (k) of this contained a provision which would relieve the life tenants from taxation under it on amounts representing depreciation, even if such amounts were actually and rightfully received by the beneficiaries. (This provision is copied in the Appendix, pp. 48-49 of our main brief.)

Consequently the decree affected large amounts which would not be involved in any questions of federal taxation. It is uncertain who will benefit by the decree and by the repayments, aggregating over $622,000, which it requires. It may be one or both branches of the family or neither. It may be Harvard College.

The Commissioner comments on the fact that the "decree directs repayment of amounts representing depreciation only for the year beginning in 1913, the income tax years." It is a fact that the depreciation involved did begin with 1913. The reason for this is merely that no material was available for calculating readily what the depreciation, if any, was before that time. It was during that year and soon afterwards that the important buildings of the trust were first used. (Although these facts may not appear clearly in the record, examination of the record does show that most of the expenditures for improvements were made shortly before or shortly after 1913—R. 70 to 71.)

Answering another contention of the Commissioner as to the decree, we submit that it was natural and proper that the decree should be framed in such a way as to make the beneficiaries rather than the trustee liable for the amounts erroneously paid. For it is well settled that although a trustee is liable, he may, in the absence of bad faith or unusual circumstances, collect from the beneficiaries or deduct adequate amounts from their income in the future. (See Restatement of Trusts by American Law Institute, Sec. 246.)

Nor was it unnatural that the remaindermen who were of age should have signed the notes of their mother. This was

proper security for the trustee to obtain. Making notes payable at the termination of her life estate and without interest was proper. If all of the amounts in question had been repaid in cash, the life tenants would have been entitled to the income from that amount, and the remaindermen would not be entitled to the principal of the fund until the termination of the life estate.

The Commissioner is in error in asserting (p. 41 of his brief) that "No notes or other obligations evidence even a simulated intention to repay the 93 per cent" of his share which the petitioner did not pay in cash.

The truth is that all of the distributions of depreciation have been repaid either by cash or by notes. The state court fixed the total amount of depreciation at $622,434.11 (R. 141-142). The repayments were as follows:

Appendix 8,	$305,867.06	(R. 145);
Appendix 9,	$118,353.85	(R. 146);
Appendix 10,	$69,159.35	(R. 147);
Appendix 11,	$118,353.85	(R. 148);
Petitioner's payment	$10,700.00	(R. 42);
Total	$622,434.11	

The present confusion of the Commissioner is due to the fact that the estate of Louise P. V. Whitcomb had been largely distributed prior to the entry of the decree of the Superior Court, and consequently a large part of the repayments for which her estate was liable was made by notes of her next of kin (R. 145-146 and R. 148).

Some of these facts may not appear clearly in the record, but this merely illustrates the futility of contentions such as the Commissioner now makes, which are not definitely established by the record which he presented in the courts below.

III.

OUR POSITION ABOUT THE NECESSITY FOR A DEPRECIATION RESERVE IS CORRECT.

The Commissioner cites no California authority whatsoever in contradiction of our argument, or in opposition to the decree of the probate court.

Undertaking to state the "correct rule", the Commission insists that:

> If the trustee deducts the cost of repairs and renewals in computing the net income payable to life beneficiaries he may not also take a deduction for depreciation. (Res. Br. p. 10; see also p. 17.)

This implies the converse that:

If the trustee does *not* deduct the cost of repairs of renewals in computing the net income payable to life beneficiaries, he *must* take a deduction for depreciation.

The Commissioner argues that the record does not show the trustee did not deduct repairs and renewals, and advances his "inference" to the contrary. (Res. Br. p. 10; see also p. 17.)

We submit the record is clear.

The remaindermen's objection (R. 129-132), verified by the oath of their attorney (R. 131-132), after setting up the depreciation sustained, says: "that no reserves *or other provision for such depreciation* have been made by the trustee". (R. 130.)

The trustee's answer, also under oath (R. 133-135), admits this expressly. (R. 133.)

The Probate Court's order (R. 136-139) and the amended order (R. 140-144) both find the amount specified was "a proper amount to be allowed for depreciation" (R. 137, 141), and that the income had been disbursed "*without* deduction of reserves *or other provision for depreciation.*" (R. 138, 142.)

Despite this, the Commissioner suggests (Res. Br. p. 18) the possibility that provision for repairs and renewals was

made out of the "Expenses paid", shown in the account. (R. 110-126.)

If so, it would have left little to meet the ordinary expenses of the trust, taxes and insurance. For sixteen years the total depreciation was $622,434.11. (Res. Br. p. 41, note 14.) The total "expense" for the same period was about $100,000 greater. For the year 1921, "expense" was $51,947.10 (R. 121), while depreciation was $43,003.16 (R. 36). On "an investment of more than $2,000,000" (Res. Br. p. 18), in a hotel, local taxes must have been more than $100,000 in sixteen years, more than $8,000 for the year 1921.

The Commissioner's suggestion, moreover, is contrary to the Board's finding that "the *estate* suffered exhaustion, wear and tear" in the figures named (R. 36).

If all the exhaustion, wear and tear on the specific properties for the estate had been made good, as the Commissioner suggests, by repairs and renewals out of current income, it could not have been true that the *estate as a whole* had suffered exhaustion, wear and tear.

The Commissioner's first footnote (Res. Br. p. 19) intimates, somewhat in this connection, that "The burden of proof is on the petitioner."

That burden was on petitioner before the Board, and petitioner sustained it there. The Commissioner is attacking the finding the Board made in favor of the petitioner. He is bound by the stipulation that these findings "insofar as they are not inconsistent with the foregoing are agreed to be correct and to be fully supported by adequate and competent evidence." (R. 66.) So far as the record goes, the burden of showing error on the part of the Board rests, not with us, but with the Commissioner.

The general rules as to depreciation are as applicable to property held in trust as to any other property. Wherever depreciation questions arise, whether under trusts, under

income tax laws, or, for example, in public utility rate cases,[3] they should be solved by a consideration of sound principles of accounting and "the ordinary business customs with respect to depreciation or obsolescence." (Am. Law, Inst. Restatement of Trusts, Tentative draft No. 4, Section 231, Comment (e)[4].)

Business men and accountants use two different methods to provide for the retirement of property exhausted in use. Where renewals are frequently necessary, and are carried on as a regular part of the program, as with the rails and ties of a railroad, the capital accounts are left alone, and the current cost of renewals, like any other current expense, comes out of current income. Major items, however, such as buildings, machinery, etc., are not susceptible of such treatment. Renewals are required at irregular intervals. Their cost is such that current income could not meet it. The practice there is to charge against income an annual amount based upon the expected life of the property, crediting these annual installments to a reserve against which to charge the cost or value of the property when it is ultimately retired. Either one of these methods may be used, depending upon which is appropriate to the situation. Or there may be a combination of the two.[5] The sheets, glassware and kitchen utensils mentioned by the Commissioner (Res. Br. p. 18) might be regarded as short lived and taken care of out of current income, while the more substantial items, pillows, rugs and furniture, and, above all, the buildings, would properly be subjects of a reserve.

The decision of the Commissioner's predecessor, allowing this depreciation deduction on the trustee's fiduciary return, just as well as that of the probate court requiring the reserve, and that of the Board finding the estate had sustained exhaustion, wear and tear, involved investigation of all the facts and accounting methods,

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[3] Cf. *United Railways v. West*, 280 U. S. 234, 253-254, 259-273.

[4] *Saliers, Depreciation*, p. 544, lays down the customs for hotel properties.

[5] *Ibid.*, pp. 39-47.

and a determination that a depreciation deduction was proper.

The Commissioner makes inconsistent suggestions regarding a distinction between the furniture and the improvements. The first suggestion (Res. Br. p. 18-19, note 4) would deny the depreciation of furniture, but permit it of improvements. Later the opposite position is taken (Res. Br. pp. 21-22 and note 6) that furniture is depreciable, but not improvements. No reason is offered for any such distinction. The depreciable character of each is notorious.

The Commissioner's final suggestion is that since any *increase* in the value of *land* goes to the remaindermen, he should bear any *decrease* in the value of the *improvements* (Res. Br. pp. 22-23). The two ideas are not comparable. Land is *not* a wasting asset. Its value may increase or decrease with the general market or specific conditions. Improvements, however, like furniture or machinery, while they may *possibly* increase in value, will certainly be mere junk at the end of their useful life. The same is true of a building. With depreciation we have not a "risk of loss", to use the Commissioner's phrase, (Res. Br. p. 23), but a certainty of loss. There is no difference between an asset which is a wasting asset due to its depreciable character and any other wasting asset, such as a valuable leasehold or a bond purchased as a premium, as in the cases we have already listed (Pet. Br. pp. 36-37).

The cases cited by the Commissioner do not sustain his position on this point.

Hubbell v. Burnet, 41 Fed. (2d) 446, 450; Res. Br. p. 20, is the only one of the numerous tax cases which purports to construe a trust instrument and determine whether a trustee was under obligation to maintain a depreciation reserve. The trust instrument there involved, however, was a deed in no way similar to the Whitcomb will. The *Hubbell* decision was based upon the specific provisions of

that trust deed, and does not assist in the construction of the Whitcomb will.

Whitcomb v. Blair, 25 Fed. (2d) 528; Res. Br. p. 20; did not construe the Whitcomb will. In his 5th footnote (Res. Br. p. 21), the Commissioner makes the direct statement "this question was decided in *Whitcomb v. Blair,* not assumed". Apparently, this note was written under some misapprehension and without an examination of the briefs or pleadings in *Whitcomb v. Blair.* The taxpayer there never contended that she was not entitled to the sums which she received. The Commissioner's brief in the Court of Appeals of the District of Columbia in that case states:

> The appellant (*i. e.* the taxpayer) has not contended that the proper construction of the will in question is not in accordance with the general rules which are mentioned above (p. 12), * * * Neither in the record before the Board of Tax Appeals nor in the brief of the appellant appears any evidence or any contention that the proper construction of the will in question is not in accordance with the general rules above mentioned. (p. 13.)

This is the correct contemporaneous statement of the predecessor in office of the present Commissioner, that the question of construction was not raised in *Whitcomb v. Blair.* It follows that it could not have been decided in that case.

The Commissioner also cites *Roxburghe v. United States* (64 C. Cls. 223; Res. Br. p. 20). In that case the Court spoke of "her distributive share. The amount of it is not in dispute." There was no attempt to construe the instrument to determine what the distributive share was.

Smith v. Keteltas (62 App. Div. 174), merely held that it was impracticable in that case to estimate the amount of the depreciation. That condition does not exist in our case, where both the probate court and the Board, without difficulty, have found the amount of the depreciation for each of the years in question.

Matter of Chapman (32 Misc. 187; Res. Br. p. 21), was a case of a specific bequest of a vessel, and comes within the exception to the general rule which we have already mentioned (Pet. Br. p. 37), where wasting assets are bequeathed specifically. (See, for example, Perry on Trusts, 7th Ed. Vol. 2, par. 548, Restatement of Trusts, Section 231, comment f(1)).

The Commissioner cites Restatement of Trusts Section 225 comment i; and other authorities as holding that

> permanent *replacements and* improvements are not chargeable against the income.
> (Res. Br. p. 22.)

These authorities deal not with *replacements,* mere restoration, but with real improvements, new construction and investment. The Restatement recognizes the duty of the trustee to preserve the principal (Sec. 225 (1) (b) to create proper reserves out of income (*ibid* comment d) and to amortize improvements added by the trustee (*ibid* comment k and illustrations 6 and 7).

In connection with *Whitcomb v. Blair,* the Commissioner's footnote 5 (Res. Br. p. 21) intimates that he asks to be relieved of his stipulation (R. 177) so as to contend that the cases of the petitioner in Nos. 139, 141 and 144 should be decided on the ground of *res judicata.* This is the first time the Commissioner has made such a suggestion. The answers are clear enough.

First, there is no plea of *res judicata.*

Second, There is no evidence in the record to support this contention.

Third, This point is not assigned as error in the Commissioner's petitions for review in the Court of Appeals.

Fourth, the construction of the Whitcomb will was not in issue or determined in *Whitcomb v. Blair.* One relying upon the plea of *res judicata* would have to establish that the question was in issue and determined. The Commissioner has not attempted to do so. What we have already

said, *supra*, p. 17, indicates sufficiently that the question was not in issue in the earlier case.

In support of this suggestion of *res judicata*, the Commissioner cites *Southern Pacific R. R. v. U. S.*, 168 U. S. 1. (Res. Br. p. 21, note 5.) The distinction between that case and the case at bar is obvious. In that case the earlier pleadings and proceedings were in evidence, and the Court held under its rule that, in effect, it had been pleaded in the later proceedings. This Court, over fifteen pages of its opinion, analyzed the earlier proceedings carefully, in order to ascertain whether in them the precise question involved in the later proceedings had been "put in issue and directly determined", for only if it had, were the earlier proceedings binding in the later proceedings (pp. 48-49).

The Commissioner relies (Res. Br. pp. 10, 23-24) upon "practical construction" of the will. This was impossible. The remaindermen were minors. Those who attained majority and filed exceptions were in no way parties to the transactions by which the life beneficiaries were over-paid. The trustee could not bind the others. Even if the adult life beneficiaries knew they were over-paid, their acquiescence could not bind their issue who were the real ones prejudiced.

Respectfully submitted,

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